Comptroller General
of the United States

Washington, D.C. 20548

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Decision

Matter of: Hershey Foods Corporation

File: B-245250.3

Date: February 3, 1992

C. Stanley Dees, Esq., Thomas C. Papson, Esq., and Alison L. Doyle, Esq., McKenna & Cuneo, for the protester.
Robert H. Koehler, Esq., Mary Beth Bosco, Esq., and Curtis V. Gomez, Esq., Patton, Boggs & Blow, for M&M/Mars, Inc., an interested party.
Terry McGinnity, III, Esq., Edward C. Hintz, Esq., and Michael Trovarelli, Esq., Defense Logistics Agency, for the agency.
Anne B. Perry, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the decision.

DIGEST

Agency reasonably concluded that awardee offered a commercial product (i.e., a product purchased by entities other than the federal government) where the record contains evidence that the awardee sold the product to the general public.

DECISION

Hershey Foods Corporation protests the award of a contract to M&M/Mars, Inc. under request for proposals (RFP) No. DLA13H-91-R-2242, issued by the Defense Logistics Agency (DLA) for 6,929,004 Type VIII heat resistant milk chocolate bars to be included in ready-to-eat meals. Hershey essentially alleges that the Mars product does not satisfy the solicitation's commerciality provision.

We deny the protest.

The solicitation, as initially issued, stated that by submitting an offer, the contractor was certifying that its offered product:

> "meets the specified salient characteristics and requirements of this CID [commercial item description]; . . . has a national or regional distribution from storage facilities located within the United States, its territories, or possessions; and is sold on the commercial market."

Amendment 1 provided a set of more stringent inspection and acceptance provisions applicable to offerors who did not propose a commercially available product, but who would produce the product in accordance with the CID A-A-20177. Amendment 4, stated that:

> "Offerors are required to respond whether offers are based on production of commercial product as qualified in the Contractor's certification clause of CID A-A 20177 or the production of products that do not have commercial acceptability but will be in accordance with the salient characteristics of CID A-A 20177." (Emphasis added.)

The RFP also informed offerors that award will be made "to the responsible offeror whose offer conforming to the solicitation will be the most advantageous to the [g]overnment, cost or price or other factors, specified elsewhere in this solicitation, considered."

Hershey and Mars submitted the only proposals by the August 1, 1991, amended closing date for receipt of initial proposals, and on August 6, the agency awarded the contract to Mars as the low-priced, technically acceptable offeror. Hershey protested this award on August 16, alleging that the Mars product was technically unacceptable because it did not comply with the Food and Drug Administration (FDA) standard for the identity of milk chocolate; and that the award was improper since the agency admittedly failed to test and approve the Mars product demonstration models (PDMs) as required by the solicitation.

We denied Hershey's protest on December 18, finding that the contract award was not improper merely because the agency inadvertently failed to test and approve Mars' PDMs prior to award where the solicitation did not require any specific testing, and Mars was otherwise obligated to supply a product that met the solicitation specifications. Hershey Foods Corp., B-245250, Dec. 18, 1991, 91-2 CPD ¶ ___.

After receiving the agency report, Hershey filed a supplemental protest alleging that Mars falsely certified that it was offering a commercial product. The protester

also alleges that the agency used undisclosed criteria in making the award based on the pre-best and final offer (BAFO) evaluation document.[1]

Whether a product is commercially available is a broad concept that may be satisfied in different ways, and we will not disturb a contracting officer's discretionary determination that a commercial product requirement has been met as long as there is evidence to support that determination. American Seating Co., B-229915, Apr. 26, 1988, 88-1 CPD ¶ 408. We believe that the interpretation of a solicitation's commercial product requirement should be consistent with the meaning of the term "commercial product" as used in the Federal Acquisition Regulation (FAR), which essentially provides that an item is not a commercial product when its only use is for the government instead of the general public, or when it has been offered for sales commercially but no sales other than to the federal government have actually occurred. See FAR §§ 11.001 and 15.804-3(c); Senstar Corp., B-225744, Apr. 2, 1987, 87-1 CPD ¶ 373; Hicklin GM Power Co., B-222538, Aug. 5, 1986, 86-2 CPD ¶ 153.

While Mars was not required to offer a commercially available product, it did certify that its chocolate bar was on the commercial market.[2] Hershey argues that Mars' certification of commerciality was improper since it has only sold 31,680 chocolate bars, worth $6,019.20 to the public on the commercial market, which Hershey contends is insufficient to constitute commercial sales. The protester also points out that the agency's Director of Contracting, whose approval is a prerequisite for award, expressed a reservation as to whether such limited sales were sufficient to constitute commercial sales.

While the record shows that the Director of Contracting did express concern, it also reflects his statement that "It could be argued, however, that the RFP definition of

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[1]The protester also reasserts that the agency unreasonably failed to conduct sufficient testing to ensure minimum acceptability of the offered products. We will not consider this allegation since we addressed it in our initial decision and found that the solicitation did not contain any requirement for testing and that an allegation that it should have required specific tests was untimely. Hershey Foods Corp., supra.

[2]Mars, like Hershey, certified that its product was commercially available and submitted a Standard Form (SF) 1412 which provides an exemption from supplying certified cost and pricing data for commercially available products.

'commercial market acceptability' did not include a requirement for substantial sales and that M&M Mars, with a national reputation in the candy industry, should qualify for this item." The Director, in the same memorandum, approved award to Mars based on the information before him. We know of no requirement, and Hershey has not cited any, which conditions a determination of commercial market acceptability on a particular volume of sales. Here, the contracting officials noted the number of bars sold by Mars to the general public, and concluded that this volume was sufficient to constitute commercial market availability. We have no basis to find this determination unreasonable.

Hershey next argues that the agency evaluated proposals in accordance with undisclosed criteria.[3] In support of this argument, the protester identifies an agency pre-negotiation memorandum which includes the following statements:

> "It was determined at that time to accept the offer of M & M Mars. M & M Mars has been an outstanding supplier to both the MORE ration and the MRE program. . . . Since MRE IX (currently shipping MRE XII) M&M Mars has shipped conforming product and met all required delivery schedules. M&M Mars stands behind their product and is in contact with our Natick labs."

Hershey alleges that the RFP did not provide that such elements would be evaluated for award purposes. We find that this argument without merit. These concerns relate specifically to Mars' past performance and reliability, matters which pertain to an offeror's responsibility, which the agency is required to affirmatively determine prior to making an award. FAR § 9.103(b). The agency properly could consider this information incident to determining Mars' responsibility, which it states to be the case, and as we

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[3]Hershey also argues that the solicitation failed to provide what factors other than price would form the basis for award. Although we do not find support in the record for sustaining Hershey's protest on this basis, we do not discuss the allegation because it is untimely. It challenges an alleged impropriety apparent on the face of the solicitation and, therefore, was required to be filed prior to the closing date for receipt of proposals. 4 C.F.R. § 21.2(a)(1) (1991), as amended by 56 Fed. Reg. 3759 (1991).

previously held, award under this solicitation properly was made to the low-priced, technically acceptable offeror. See Hershey Foods Corp., supra.

The protest is denied.

James F. Hinchman
General Counsel